NO. 1564

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ELIZABETH DECKER,

Appellant,

vs

THE PACIFIC COAST STEAMSHIP COMPANY,
a Corporation,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

E. M. BARNES, Attorney for Appellant

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THE PACIFIC COAST STEAMSHIP COMPANY, a corporation, and JOHN JOHNSTON,

Appellee.

STATEMENT OF THE CASE.

This is an action commenced by the appellant against the defendant corporation to abate a private nuisance. The defendant John Johnston, being equally interested with the appellant but refusing to sue with her, she made him a defendant under the laws of Alaska.

Appellant alleged herself and the defendant John Johnston to be the owners in fee simple absolute of Block L, Town of Juneau, against which the tide regularly ebbs and flows, that between said premises and deep water the defendant corporation now

maintains, and for more than ten years last past has maintained, buildings and a wharf. That defendant will continue to maintain said buildings and wharf to plaintiff's irreparable damage unless said buildings and wharf are abated by this Honorable Court and that by said maintenance appellant and her co-tenant have been during all of said time deprived of and prevented from wharfing out or maintaining a wharf in front of their said premises, and prevented from access to deep water or at all from their abutting premises described in appellant's complaint, which is a private, direct, irreparable and material damage to plaintiff and her co-tenant and they have thereby been damaged in the sum of one thousand dollars, and that said maintainance of said wharf and building by said defendant corporation is a private nuisance to plaintiff and her co-tenant and plaintiff prayed judgment for herself and her said co-tenant in the sum of one thousand dollars, and for her costs and disbursements and that said building and wharf be abated.

Defendant corporation admitted its corporate capacity, admitted plaintiff's ownership of the premises described in plaintiff's complaint, and that the said premises abutted on the waters of Gastineaux Channel at mean high tide, as alleged in plaintiff's complaint. Denied that defendant corporation maintained the buildings and wharf referred to in any other capacity than as lessees, or that said building or wharf is a nuisance, and plead as a separate defense the laches of plaintiff in maintaining this

action, set up an alleged quit-claim deed by plaintiff and her grantors while the United States was the owner of the premises, of all the littoral or appurtenant rights that they then owned or might thereafter exist between ordinary line of high tide and deep water, to the People's Wharf Company, a corporation, except a warehouse building, said defendant showing that Franklin Street lay between said premises and the shore of Gastineaux Channel, and thereafter the Pacific Coast Company, a corporation, duly purchased for a valuable consideration, in good faith and without notice of any claim whatsoever of the plaintiff or her grantors, the premises described in the said deed of February 20, 1897, together with the rights therein contained and incident thereto. That the People's Wharf Company and their successors in interest, erected valuable improvements on said property (the littoral and appurtenant rights) (Record, p. 11, par. 1, lines 10, 11 and 12) lying between Blocks K and L and deep water, and that the defendant corporation being the lessee of the Pacific Coast Company, is not the real party in interest and therefore there is a defect of parties defendant. Appellant replied denying that she or her grantors or any other person or at all by due or proper conveyance, or at all conveyed to People's Wharf Company, or any other person, or at all, any littoral or appurtenant rights or any part thereof then or that might thereafter exist in or to the shore of Gastineaux Channel, or at all, between any line of high tide or deep water or at all in the Town

of Juneau or any other place, or that said People's Wharf Company was or is a corporation or that any deed conveying said property was ever witnessed, acknowledge, signed or executed by any of said parties or filed for record at any time or that the said premises or rights or any part thereof under said deed or at all were ever purchased in good faith or at all or in reliance on any deed by John J. Waterbury or any other person or that the Pacific Coast Company, a corporation, ever purchased or at all for any consideration or at all said property, or rights, or any part thereof without notice or at all at any time or that the wharfs or other improvements were erected except as alleged in plaintiff's complaint and that they do not exceed in value $1,500.00 or that defendant is not the real party in interest or that there is any defect of parties. That up to October 5, 1898, the land mentioned herein was the exclusive property of the United States of America and was not owned by private persons or subject to private ownership. That at no time until the year preceding the commencement of this action was plaintiff informed of any of her rights herein. That she is a woman and at all times relied on the advice of hired counsel and none of them until the past year ever informed her of any of her rights herein and previous to said time she had at almost all times since her majority been a married woman.

The trial court found as facts that plaintiff did by due and proper conveyance quit-claim and convey to the People's Wharf Company, grantor of defend-

ants lessor, all the littoral rights immediately abutting on said Block L and that through mean conveyances the lessor of the defendant corporation is and now was the owner, in the possession by its lessee, the defendant corporation, and entitled to the possession as against all persons save its lessee and the United States of all of said premises at the commencement of this action and that plaintiff had no right, title or interest in or to any of the littoral or riparian rights or tide land immediately abutting on and in front of Blocks K and L (the littoral rights to Block K were not in controversy) and that plaintiff had permitted the defendant corporation's lessor to erect improvements of the value of $18,000.00 without objection, claim or notice of equity on her part to said premises, and that the defendant lessee is not the real party in interest, it being simply lessee of the Pacific Coast Company and as conclusions of law the trial court finds:

The Pacific Coast Company lessor of the defendant, the Pacific Coast Steamship Company is as against all persons except the United States the owner of the premises described herein, and was such owner at the commencement of this suit and at all times since the commencement thereof.

The judgment of the trial court is that the Pacific Coast Company is the owner of, in possession of, and entitled to the possession of the premises described in the complaint herein at the time of the commencement of this action and long prior thereto was such owner of said premises, and that the plaintiff had

no right, title or interest in or to said premises, or any portion thereof at the time of the commencement of this action.

In the Court's opinion it says: The plaintiff with defendant John Johnston now owns Block L and further that there are three questions decisive of the case:

First—The defendant corporation being but the lessee of the Pacific Coast Company is not the real party in interest.

Second—That the quit claim deed above referred to did effectually convey any right which plaintiff then held as possessory owners, or which she might thereafter acquire as patentee of those premises from the United States, and

Third—Plaintiff was estopped from questioning these acts after the long lapse of time.

Appellant takes the position:

That a quit-claim deed conveys no after acquired rights.

That a littoral right is appurtenant to the land, goes with it and cannot be severed from it.

That in actions to abate a nuisance the party who continues it, as well as the party who erects it, is equally liable—the tenant as well as the landlord.

That in actions of this nature there can be no laches on part of plaintiff. Each day's continuance of a nuisance is a fresh one.

That neither the defendant corporation nor its lessor nor its lessors grantor ever had any more right, title or interest or now has any more right,

title or interest in or to the littoral rights appurtenant to the premises in said complaint named than does a jack rabbit.

ARGUMENT

That this judgment is erroneous because not supported by the pleadings.

As to Assignment of Error XVII.

The Court erred in rendering its decree herein "That the plaintiff had no right, title or interest in or to said premises, or any portion thereof, at the time of the commencement of this action" and the Pacific Coast Steamship Company is the owner of, in possession of and entitled to the possession of the premises described in the complaint herein as against all persons except the United States, and that the said Pacific Coast Company was at the time of the commencement of this action and long prior thereto, such owner of said premises.

In no place either in the decision of the Honorable Trial Court or its conclusions of law or judgment is a single authority quoted.

"Premises mean land and tenements."

Robinson vs. Mercer County Mut. Ins. Co., 27 N. J. Law (3 Dutch.) 134-141.

Howard Fire and Marine Ins. Co. vs. Cornick, 24 Ill. (14 Pick.) 455.

Carr vs. Roger Williams Ins. Co., 60 N. H. 513-520.

Craft vs. Indiana D. & W. Ry. Co., 46 N. E. 1132-3

Sandy vs. State, 60 Ala. 18, 19.
Thompson vs. Brown, 73 N. W. 194-5.
State vs. French, 22 N. E. 108.
Heming vs. Willetts, 7 C. B. 709-715.
Winlock vs. State, 121 Ind. 531-533.

Not a scintilla of evidence to support this judgment.

Not a word of pleading to support it and the admissions in the pleadings are equally against it.

It is true Finding III. is to that effect. Record, p. 3.

But appellant excepts to the sufficiency of the evidence to support said finding.

Record, pp. 96 and 101.

"This Court cannot presume that the trial court required or permitted evidence to be introduced on the trial for the purpose of establishing or rebutting allegations of the complaint not denied by the answer; nor can it be presumed that any evidence was received by the trial court, except such as was pertinent to the issues made or tendered by the pleadings, and evidence tending to rebut such legitimate evidence."

Gregory vs. Nelson, 41 Cal. 287.

"Any finding or judgment of the court repugant to the facts admitted by the pleadings is erroneous."

Idem.

It is alleged in plaintiff's complaint that she and defendant Johnston "now are the owners in fee simple of Block L of the Town of Juneau, Alaska, according to the recorded map or plat thereof, of record

in the recorder's office at Juneau, Alaska."

Record, p. 3.

This is not denied. The Court in its opinion says "The defendant Johnston is the joint owner with the plaintiff of Block L of the town of Juneau."

Record, p. 18.

"The plaintiff, who with the defendant John Johnston now owns Block L, derives her title through Edward O. Decker, her deceased husband.

Opinion of District Court, Record, p. 21.

Town trustees patent to J. M. and E. O. Decker for said premises.

Record, pp. 40 to 46.

Deed J. M. Decker to John Johnston.

Record, p. 46.

The court in the settled bill of exception says "it is admitted by the pleadings that plaintiff and John Johnston are owners of the '*premises*' as described in the complaint."

Appellant would most respectfully call the court's attention to the fact of the presentation of the bill of exceptions on October 29, 1907, and to the rule of the trial court and ask is it good practice to keep an appellant waiting from October 29, 1907, to January 6, 1908, for the court to settle the bill of exceptions.

Record, p. 97.

Appellant here calls the court's attention to a mistake of the printer in his black face sub-head on p. 55 of Record: "Deed Edward O. Decker et ux. to Jay M. Decker et al." It should be J. M. and E. O. Decker et ux. to People's Wharf Company, and further

to the wording of that deed: "We do, as owners of said lots K and L, the same abutting upon Franklin Street in said city, the said street running along the line of ordinary high tide, being the shore of Gastineaux Channel, in said town of Juneau, and we do as such owners grant to the said party of the second part and forever quit-claim to them all littoral and riparian rights appurtenant thereto if any that we may now have or that may hereafter exist for any cause whatsoever in our favor, our heirs, administrators or assigns."

Record, p. 56.

The deed fully and fairly shows that Franklin Street lay between Block L and Gastineaux Channel, and this deed was accepted by the named grantee. It is fair to presume that if Franklin Street had not lain between Block L and Gastineaux Channel this appellant would not have signed it; all the grantees got at that time is nothing. I will not burden this record with authorities in support that where a street intervenes between the upland and tide water no littoral rights attach to the upland.

The Honorable Trial Court says:

"The evidence adduced on the trial shows that Blocks K and L did abut upon tide land."

Record, p. 19.

There was no evidence offered on the trial concerning that point except the map, the deed and map spoke for themselves and the pleadings admitted that at the commencement of this suit "That said premises abut on the waters of Gastineaux Channel at

mean high tide and against which premises the tide regularly ebbs and flows twice in twenty-four hours."

Allegation IV. Record, p. 3.

Allegation IV. Record, p. 10, and there is no pleading that at any other time they did so abut, appellant submits that the Honorable Trial Court is mistaken and the mistake is against plaintiff appellant. It says:

"The evidence nowhere discloses any change in the relative position of Block L and the tide land between the time of the giving of the deed and the commencement of this suit."

Record, p. 21.

The Court further says: "It is a well-settled rule of law that whenever a nuisance exists upon the premises at the time of letting, the landlord by letting the premises in such condition, consents to the continuance of the nuisance, and is liable to all injuries to third persons from its continuance by the tenant."

Record, p. 21.

"That the holder by possessory title or a patent may exercise that (littoral) right, or give the rights to some other is beyond question, and has been held so in repeated instances."

Record, p. 22.

A Judge stood waiting at Peter's gate,
Pete said: "You know I lawyers hate,
But you've been judge, give me your paw,
When you made decisions, you quoted law."

It's too elementary to quote authority that a lit-

toral proprietor has the right to wharf out.

Expressio unius est exclusio alterius.

Under the Honorable Trial Court's definition of a littoral right what more did the grantees buy than the right of ingress and egress? They certainly bought no right to erect "stores and shops."

The Court finds as a fact "the said People's Wharf Company and their successors in interest, have erected upon said tide land valuable improvements in the shape of stores, shops."

Record, p. 32.

The most they bought, if anything, was a littoral right, and under no definition of a littoral right does it include a right to erect stores and shops on the tide land, and those stores and shops should be abated, even granting they purchased the littoral right.

The grantee, People's Wharf Company, corporation, predecessor in interest of the defendant corporation, fully realizing that a grant of the littoral right without a grant of the upland is a—was a nullity, in their pretended conveyance of said littoral rights convey as follows: "That whereas the said party of the first part is a corporation duly incorporated and existing under and by virtue of the laws of the State of Oregon and in pursuance of the statute in such cases made and provided, has acquired and is the owner of a certain wharf structure, warehouses thereon situated and is the owner of the land abutting upon the shore to which said wharf structure is appurtenant."

Record, p. 63.

meaning Blocks K and L, they refer to the map and the map shows Blocks K and L to be abutting at that time on Franklin Street.

Record, pp. 66 and 68.

This is the inception of their title to the premises "described in the complaint" and it's all the evidence they have, save and except the decree of the Honorable Trial Court decreeing they own it, which decree appellant asks to be reversed. And is not appellant's exception to the decree well taken?

Appellant confidently asks that her exception to the sufficiency of the evidence to sustain finding III

Record, pp. 30 and 31

be sustained.

Record, pp. 95 and 101.

Assignment of errors IV.

Record, p. 99.

The deed of J. M. Decker, E. O. Decker and his wife to People's Wharf Company was incompetent evidence for this: Congress alone has power to make grants below high water in any territory of the United States.

It appears from the deed that Franklin Street was between the upland and ordinary high tide.

The deed is a quit-claim. At the time of making it all the land in Alaska belonged to the United States and a quit-claim deed only conveyed the interests which the grantor possessed at the time of making the deed, which appears from the deed and from what the Court takes judicial notice of, to be nothing.

The right to erect and maintain a wharf cannot belong to any person save the littoral proprietor, which by the admission of the pleadings is the plaintiff

No rights to wharf out can be conveyed without a conveyance of the land itself. The wharf right cannot be destroyed by an attempted grant thereof to a stranger.

The ownership of the land is a necessary incident to the erection of a wharf.

The rights of the littoral owner cannot be detached from the soil out of which they arise or to which they are incident, and therefore cannot be transferred without an actual conveyance of the soil itself. A purchaser by a quit-claim deed is not a bona fide purchaser and has no rights to the after acquired title of the grantor in a quit-claim deed.

The proposed evidence was also immaterial. "Congress alone can grant tide lands in the territories."

U. S. vs. Winans, L. Ed.

Horace W. Carpentier claimed the right to erect and maintain wharves on the water front of the City of Oakland, Cal., because of a deed granting those rights and also granting the tide land. The corporation (City of Oakland) had no power to aleinate these lands unless such power was conferred by the legislature * * * Carpentier had no rights and the deed was void."

Southern Pac. Co. vs. Western Pac. Co., 144 Fed. 179.

And by the same reasoning the alleged grant to defendant's grantors is void.

At the date of the deed under which the defendant's lessor holds, 1897, Alaska was under the Oregon law, and under the Oregon law then, the abutting owner had no right to wharf out, nor possessed any littoral rights.

Hinman vs. Warner, 6 Or. 408.
Parker vs. Taylor, 7 Or. 435.
Parker vs. Rogers, 8 Or. 183.
Shively vs. Parker, 9 Or. 500.
McCann vs. Oregon R. & Nav. Co., 13 Or. 455.
Laws of Oregon 1874, p. 76.
Bowley vs. Shively, 22 Or. 410.
Laws of Oregon 1872, p. 129.
Shively vs. Bowley, 38 Law Ed. 350.

No one but the littoral proprietor can acquire or own the littoral right.

With great confidence I refer this court to San Francisco Sav. Union vs. R. G. R. Petroleum & Min-Co., 77 Pac. 823 *et seq.*

Inter alia the Supreme Court of California says: "That no one else can acquire or own it (the littoral right), gives the abutting owner that dominion which enables him to protect it for the benefit of his own property which he has located, occupied and improved under the express assurance to some extent, and the implied assurance to a greater extent that individual interference shall not disturb him from the ocean side. Whatever unlawfully obstructs the free use of this property or unlawfully obstructs

the free passage of egress or ingress to and from it, is a nuisance. While this is a decision from a state court, the high standing of the author, and based as it is on United States decisions appellant confidently expects serious consideration therein."

"He cannot convey upon another the right of a riparian owner without a conveyance of the soil upon the margin of the stream."

Wood on Nuisances, p. 420, par. 343.

"That a right to erect and maintain a wharf cannot belong to any person save the littoral proprietor. It is appurtenant to the abutting land, the riparian right is as much property and is as valuable as any right possessed by the owner of the upland, and it can no more prevent his wharfing out by an attempted grant of it to another person than it can prevent him from building on his upland. The state, if it was for the public good, might forbid the riparian owner to exercise his wharf right. But when the wharf right is destroyed by an attempted grant to a stranger the property rights of the owner of the upland are taken in violation of the constitution, and any decision which sanctions such a proceeding is fundamentally wrong."

Farnham, pp. 546 and 548.

What would that learned writer write concerning a decree which not only destroys the wharf right but the right to the upland also, as does this decision?

"The rights of riparian owner cannot be detached from the soil out of which they arise, and to which they are incident and therefore cannot be transferred

without an actual conveyance of the soil itself."

Wood on Nuisances, Vol. 1, p. 421.

"Owner has exclusive right to build wharf."

Idem, p. 669, par 491.

"The right of wharfage remained appurtenant to it, because as land adjacent to the river that right was annexed to it by law, and could be exercised on it by the proprietor. * * * Defendant must show a conveyance of the locus in quo, as parcel, a claim as an appurtenant and not in locus in quo must fail * * The right to wharf belonging only to land bounded by the water, the right which a riparian proprietor has with respect to water are entirely derived from his possession of land abutting on the river."

Potomac Steamboat Co. vs. Upper Potomac Steamboat Co., 109 U. S., 27 Law Ed. 1074.

The riparian rights are incident to riparian ownership, exist with such ownership and pass with the transfer of the land.

Ill. C. R. R. Co. vs. People of the State of Ill., 36 Ill. 1040.

"If he grants away a portion of his land so abutting, then the grantee becomes a riparian proprietor and has similar rights. * * * The right of wharfage is appurtenant to it.

Potomac Steamboat Co. vs. Upper Potomac Steamboat Co., supra.

My neighbor, the owner of the apex, has a right to pursue the dip of his vein into my ground and beyond. Why? Because he is the owner of the

apex. Can be convey that right to another without conveying the soil? The answer is axiomatic.

The owner of abutting land has the right to wharf out. Why? Because he is the owner of the abutting land. Can he convey that right without conveying the soil? Is not the answer equally axiomatic?

The quit-claim deed conveyed no after acquired right.

"A quit-claim deed only conveys the interest which the grantors possess at the time of making the deed."

Baker vs. Woodward, 12, p. 11.

"Quit-claim deed conveys nothing and grontor can acquire subsequent valid title."

Devlin on Deeds, Vol. 1, par. 27.

"It is urged on behalf of appellant that the rule is well settled that a mere quit-claim deed of the right, title and interest of the grantor does not estop him from asserting an after acquired title, which is absolutely correct."

Dorris vs. Smith, 7 Or. 276.

Baker vs. Woodward, 12 Or. p. 11.

"A deed of quit-claim does not operate to pass an interest not then in existence."

Van Rennssel vs. Kearney et al., 11 How. 322.

"The operative words of a quit-claim deed are release, remise and quit-claim, and such deeds purport to convey and does convey, no more than the present interest of the grantor, and does not operate to pass an interest such as may afterward vest."

Morse vs. Cohauned Bank, 3 Story 365.

Bragg vs. Poulk, 42 N. E. 517.

Webster vs. Webster, 33 N. H. 226, 6 Am. Dec. 705.

Givan vs. Doe, 7 Blackb. 212.

Hannon vs. Christopher, 34 N. J. Eq. 459.

"No estoppel can in general arise from a deed of quit-claim."

San Francisco vs. Lanton, 18 Cal. 465, 79 Am. Dec. 187.

Rogers vs. Burchard, 34 Tex. 441, 7 Am. Rep. 283.

"A purchaser who acquires his title by a quit-claim deed cannot be regarded as a bona fide purchaser without notice, but takes only such title as the grantor can lawfully convey."

McAdow vs. Black, 6 Mont. 601.

"Grantee by quit-claim, without warranty, is not entitled by force of his deed to after acquired title."

Smith vs. Washington, 88 Mo. 601.

Fay vs. Wood, 65 Mich. 390.

"A purchaser by quit-claim cannot be regarded as a bona fide purchaser without notice, in such cases the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey."

May vs. Leclaire, 20 Law Ed. p. 53 and citations.

"Where grantor had no title his quit-claim passed none."

Dunn vs. Barnum, 51 Fed. 361.

Assignment of Error No. XXII.

Record, p. 102.

The court erred in making the finding that defendant corporation is not the real party in interest.

"When promoter commits nuisance and company continues it the company is the proper party."

10 Cyc. 269.

"Every continuance of a nuisance is held to be a fresh one."

Balt. & P. R. R. vs. 5th Bap. Church, 34 L. 788, 137 U. S.

"An action for nuisance will lie against the tenant even though there was no notice of abatement."

Whiteneck vs. Phil. R. R. Co., 57 Fed. 501.

"In actions for nuisance the tenant is liable."

Wood on Nuisances, p. 332, par. 269.

"An action will lie against one erecting a nuisance and one continuing a nuisance erected by another."

Stople vs. Spring, 10 Mass. 72.

Defendant introduced the equitable defense of laches of plaintiff in his answer.

Par. II. and 11., Record, pp. 12 and 13.

The court in its opinion found the plaintiff was estopped through her laches.

Record, p. 23.

"That the plaintiff herein is the widow of said E. O. Decker, and during all of said time since the 20th day of February, 1897, has allowed improvements of great value from time to time without objection, claim or notice of equity on her part to said premises."

Finding No. VI., Record, p. 32.

Her deed was duly recorded during all that time

and what more notice need she give?

Record, pp. 43 and 47.

At any rate

"Prescription of whatever length of time will not justify a nuisance. Every day's continuance is a new offense."

The Northwestern Fertilizing Company vs. Village of Hyde Park, Chauncey M. Cody et al., 24 L. Ed. p. 138.

As to Assignment No. 1.

The question asked Mrs. Decker: "How much, if any, you have been damaged by the maintenance of those buildings on that property by the Pacific Coast Steamship Company as described in the answer?"

Record, p. 39.

Did not require an expert to answer, she could not answer unless she knew. The court sustained the objection because "no proper foundation had been laid to justify or enable the court to determine whether or not this witness is competent to testify as to any damage suffered."

Record, p. 39.

Does it require any peculiar fitness to answer such questions? If not the objection was improperly sustained.

As to Assignment No. II.

"Have you some knowledge, Mrs. Decker, of the amount of freight that you would probably be able to handle over your wharf provided you had a wharf?"

Defendant's objection because question is incompetent, irrelevant and immaterial, speculative and not the proper way to prove damages.

Record, p. 52.

Plaintiff was not trying to prove damages, a preliminary question only, to qualify witness, she had been precluded from answering the first question because she was not qualified and was refused the privilege of qualifying herself to answer the second question, which she submits is error.

As to Assignment No. III.

The question: "Do you know, generally, Mrs. Decker, from common repute and what you see in the newspapers, that the charges by these wharf companies here in Juneau are excessive?" To which defendant objected because incompetent, irrelevant and immaterial, and the answer to which would tend in no way to show how much the plaintiff is damaged by the maintenance of the structure on the premises. It was not asked for the purpose of proving damages but certainly is an element that should be received in evidence. If by common repute the other wharf rates were excessive that was an element that tends to show that had she a wharf and made reasonable charges she would do a business. A man would be justified from newspaper reports and common repute in believing it would pay to invest in a water system in San Francisco that would bring pure water to the inhabitants thereof, or in investing in a dairy that would furnish pure milk to said city and if one able and willing to so invest was prevented to so in-

vest, was prevented by some butter in, would there in such case be any question as to the admissability of such evidence?

As to Assignment VI.

In admitting the deed from People's Wharf Co. the trial court erred for this: Said deed referred to the map attached, this map shows Franklin Street there the same as described in the deed of this plaintiff, which deed states it lies between Blocks K and L and the shores of Gastineaux Channel.

Record, p. 56.

The map shows the deed spoke the truth, which conclusively shows there were no littoral rights at that time, Franklin Street intervening between Blocks K and L and tide water. If the People's Wharf Company did not buy any littoral rights neither did their grantees, yet the court in its opinion says the evidence adduced at the trial shows that Blocks K and L did abut upon the tide land. Evidently the court was mistaken, but all its mistakes seem to appellant to be against this widow. With this evidence before this Honorable Court is she asking in vain to have Assignment VI. sustained?

For the same reason she asks that Assignment VII. be sustained, because the People's Wharf Co., having no littoral rights to Block L, could transfer none to John J. Waterbury and T. Jefferson Coolidge, Jr.

In Assignment VII. the assignment should read: "The court erred in admitting in evidence by defendant, against the objection of plaintiff, a deed from

John J. Waterbury and T. Jefferson Coolidge, Jr., to the Pacific Coast Company."

Record, p. 69.

And appellant's contention is that for the same reasons this assignment should be sustained.

In Assignment XIV.

The court erred in sustaining the defendant's objection to the question asked the witness Swan by plaintiff: "There is a building immediately abutting on the Decker building and not shown on the map, was not that building erected against the protest of the plaintiff in this case?"

Record, p. 91.

The witness Swan was asked by defendant on direct examination: "I will ask you if you know the value of the structures including the People's Wharf in front of Block L, as you have described?"

Record, p. 83.

Defendant in his answer alleged that plaintiff had stood by and seen defendant and its predecessors erect valuable improvements without objection on her part.

Record, p. 13.

The court in Finding VI. finds that at all of the said time since February 20, 1897, the plaintiff has allowed improvements of great value from time to time to be placed upon said premises without objection, claim or notice of equity on her part to said premises.

Record, p. 32.

And this finding as to values was based on tenant's

testimony.

In Finding V. the trial court finds the value of those structures to be $18,000.

Appellant submits she had a right on cross-examination of the defendant Swan to discredit his testimony by showing that the most valuable of all the buildings was erected against plaintiff's protest. The direct testimony was offered to show as the trial court suggested the laches of the plaintiff in allowing defendant to go on and spend all this money.

Record, pp. 83 and 84.

And is there any rule of examination that prevents us on cross-examination to show a different state of facts?

Probably the trial court did not consider the cross-examination of the witness Swan. On direct examination he testified to the $18,000, as found by the trial court.

Record, p. 84.

The premises in question herein in Block L, when asked on cross-examination he testifies the value of that in front of Block L is worth about $7,000.

Record, p. 85.

Then on pp. 88 and 89 he reduces the $18,000 to $1,600 and still the court finds in Finding V. on p. 32, that the buildings, etc., were worth approximately $18,000. As it strikes appellant there is another mistake against this widow.

Appellant does not contend that findings as to the values named is material or will support the decree, as stated before, the granting of the littoral right

did not grant the right to build stores and shops and the values proven relate to the buildings which the trial court finds are stores and shops.

As to Assignment XII.

The court erred in permitting the witness Swan to answer the question: "I will ask you what is the value of all the structures that have been described in front of Lot L, including the People's Wharf?" The answer shows one of the buildings was a warehouse belonging to plaintiff.

Record, allegation 1, p. 11.

And surely its value was not a proper question in this suit, for defendants to prove again the object of the question was to show plaintiff's laches.

Record, p. 84.

And appellant still believes the question was immaterial.

Assignment V.

The court erred in admitting in evidence by the defendant, against the objection of plaintiff, as to its competency, certified articles of incorporation of the People's Wharf Co., certified by the Recorder of Juneau recording district to prove its corporate existence.

The alleged copy shows that it was, if anything, a corporation incorporated under the general laws of Oregon, 1897.

There was no provision of law in Alaska for incorporation under the general laws of Oregon.

The statute of Oregon requires one copy to be filed with the Secretary of State of Oregon and one copy

to be filed with the County Clerk of the county in Oregon where the principal place of business of said corporation is, and the third filed with itself. None of these prerequisites appear to have been done.

It further provides, the only evidence of the proof of a corporation incorporated under the general laws of Oregon shall be a certified copy of the one filed with the Secretary of State in Oregon or the County Clerk of Oregon or the articles itself.

The production of the articles of incorporation alone (a portion of the copies certified by recorder) is not sufficient proof of the fact.

There is no finding that it was a corporation.

"A corporation is not legally in existence so as to be capable of making a contract, till its articles are filed with the Secretary of State."

Schreyer vs. Tiernan Flouring Mills Co., 29 Or. 1.

"The statute provides how a corporation may be formed and organized, and prior to its lawful creation it is idle to think of its entering into contractual relations."

Idem, p. 5.

"In the methodical order of offering the necessary evidence it would seem proper to prove the execution and acknowledgment of the articles of incorporation in triplicate, and that one of such articles had been filed in the office of the Secretary of State and another in the office of the Clerk of the County where the business is proposed to be conducted. * * * The articles of incorporation, unsupplemented by

other proof, were, in our judgment, inadequate to prove the existence of the plaintiff as a corporation."

Goodale Lumber Co. vs. Shaw, 41 Or. p. 548.

Affirmed in U. S. Mort. Co. v. McClure, 41 Or. p. 201, in an opinion by His Honor Justice Wolverton.

None of these requirements were met by the defendant corporation and yet against the objection of plaintiff as to its competency this copy of articles of incorporation certified to by the Recorder of Juneau recording district only

Record, pp. 59, 60 and 61

Was received by the Honorable Trial Court and this widow believes she was deprived of the inheritance left by her husband thereby.

If there was no People's Wharf Co. corporation then there can be no grantor to the Pacific Coast Co. corporation, and if there is no grantor to the Pacific Coast Co. corporation then there is no lessor to the Pacific Coast Steamship Co. and falls all the defenses interposed by the defendant corporation; sending this cause back for trial would avail them nothing, and appellant urges upon this court to issue a mandate directing the Honorable Trial Court to enter a judgment directing this nuisance to be abated.

Defendant has interposed the equitable defense of laches on part of plaintiff. Equity discountenances forfeitures. The record is silent as to how long plaintiff has been in a position to maintain this action. The court finds that she derives her title through her deceased husband, E. O. Decker.

Record, p. 21.

And will equity supply the gap and confirm this forfeiture of her rights?

He who seeks equity must come with clean hands, and does a trespasser's hands ever get clean?

The only rights they claim are claimed to be purchased from a corporation that has, as appellant believes, no legal existence.

There are many other assignments of error in the record, but believing enough has been shown to warrant this court in issuing its mandate as prayed for appellant at this time brings no more to the attention of this Honorable Court.

Why the District Court entered such a judgment is more than appellant has been able to fathom. It's against the pleadings, evidence, admissions of counsel and opinion of court; and owners of property here, not having the price of an appeal are standing aghast fearful to essay the checking, the graspings of this giant corporation lest their own be taken from them and adjudged the property of the corporation without that fact being litigated. Is not this the taking of property without just compensation or due process of law?

The record shows appellant speaks advisedly when she refers to the graspings of this giant corporation. What they purchased is detailed above and is shown in

Record, pp. 55 and 56.

Those composing the People's Wharf Company knew, under the law, that they had no rights under

the law; they knew they were purchasing no littoral rights when their deed described Lot L as abutting on Franklin Street. The Pacific Coast Co. corporation in its pretended purchase, under the law knew it was dealing with a mythical corporation when the description in the deed was qualified by the map and the map shows Block L to be abutting on Franklin Street; it knew, under the law, nothing was attempted to be conveyed, the defendant, the Pacific Coast Steamship Co., defendant corporation, when it made and pleads the pretended lease it, under the law, knew it was leasing from a trespasser and has the hardihood to come into court and interpose equity to support its trespass. Is not this grasping? Those pioneers who came to Alaska, blazing out an empire that some day will startle the world with its richness, in their honest endeavor to accumulate property that their loved ones left behind may live from the fruits of their labors, little thought that, when their lips were closed in death, a court acting on its equitable side, would wrest from those for whom they had struggled, and give, perhaps the widow's mite, to a corporation, its fountain head an illegal body of men acting as a corporation. So is it any wonder that this decision points its signals of danger to those unlearned in the law, and who believe their rights secured, as does this plaintiff believe, by United States grant? There have been many times when those unlearned in the law, fancying they feel the uncertainty of the law's protection—protect themselves; there have been times when the passions of

those unlearned in the law, and feeling themselves oppressed, turned the white snow into streaked red, while pitying, outraged equity stood weeping at her defiling.

We who read the decisions of this Honorable Court see shining beacon lights beckoning to us a haven, where if wrongs we have they will be righted.

Respectfully submitted,

E. M. BARNES,

Attorney for Appellant.